



Muthaura v Meru South Co-operative Savings & Credit Society (Civil Application E035 of 2024) [2025] KEHC 2812 (KLR) (13 March 2025) (Ruling)

Neutral citation: [2025] KEHC 2812 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
CIVIL APPLICATION E035 OF 2024
RL KORIR, J
MARCH 13, 2025**

BETWEEN

MIRITI MUTHAURA APPLICANT

AND

MERU SOUTH CO-OPERATIVE SAVINGS & CREDIT SOCIETY RESPONDENT

RULING

1. By Notice of Motion dated 24th October, 2024, the Applicant sought the following Orders:-
 - i. Spent.
 - ii. That this Honourable Court be pleased to grant the Applicant leave to lodge an appeal out of time against the decision delivered on the 30th day of July, 2024 by the Honourable Joyce Gandani.
 - iii. That upon grant of leave to appeal out of time, the Memorandum and Record of Appeal lodged herein be deemed as duly filed.
 - iv. That the costs of and incidental to this Application be costs in the intended Appeal.
2. The Application was brought under Article 159 of the *Constitution*, Sections 1A, 1B, 3A and 79G of the *Civil Procedure Act*. It was based on based on the grounds that judgement in the subordinate court was delivered on the 30th July, 2024 and the time for filing the Appeal had run out. That the delay was not intentional but was a result of the delay by the court registry in preparing certified copies of proceedings; that the delay was not inordinate; that the Respondent was unlikely to suffer any prejudice; and, that it was in the interest of justice to allow the Application.



The Applicant's Case.

3. The Application was supported by the Affidavit of Miriti Muthaura sworn on 24th October, 2024. In numerous averments, the Applicant set out the chronology of events from the delivery of the judgement on 30th July, 2024 stating that his advocate had corresponded with and visited the court registry multiple times to follow up on the typing of the trial court proceedings. That the proceedings were only available on 9th October, 2024 while the Certificate of delay was issued by the court on 18th October 2024. He attached various correspondence to that effect.
4. It was the Applicant's case that he could not file his Appeal within the prescribed period because the proceedings took 54 days to be typed and his inquiries at the registry showed that the registry was overwhelmed. It was his further case that his Appeal had an overwhelming chance of success and that the Respondent would not be prejudiced if leave was granted.

The Respondent's Case.

5. The Respondents filed a Replying Affidavit of Eliphias Kubai Mbogori, a current member of the Executive Committee and a former chairperson of the Respondent sworn on 4th November, 2024. In various averments, the Respondent stated that judgement was entered in the Respondent's favour for a sum of Kshs. 3,704,837 plus interest. That the Applicant sought stay of execution in the trial court through an application dated 16th August, 2024 which stated that they desired the stay orders pending the hearing of the application and an intended appeal.
6. It was the Respondent's case that the Applicant who was all along represented by an advocate did not take steps to file the Appeal within time and only resurfaced two months later with the present Application. He urged that the Applicant's sole intention was to further delay execution of the judgement in proceedings which had so far lasted 16 years. That the Respondents would be prejudiced by any further delay.
7. The Respondent noted that while the right to appeal was constitutional, extension of time was not an automatic right. They urged that while extension of time was discretionary, such discretion ought to be exercised judiciously and not capriciously.
8. It was the Respondent's further case that the Appeal was not likely to succeed as it was challenging facts which were admitted in the trial court. That the appeal raised no pertinent issues of law or fact that would lead to the judgement being overturned.

Analysis and Determination:

9. I have gone through and considered the Notice of Motion Application and Supporting Affidavit dated 24th October, 2024, the Respondent's Replying Affidavit dated 4th November, 2024 and the only issue for my determination was whether the Applicant should be granted leave to file his appeal out of time.
10. Section 79G of the *Civil Procedure Act* provides that:-

Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order.

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.



11. This court is clothed with the discretion to grant or not to grant leave to file an appeal out of time. As correctly stated by the Respondent, such discretion ought to be exercised judiciously and not capriciously. The principles upon which the court should draw guidance were aptly stated by the Court of Appeal in the case of *Omar Shurie v Marian Rashe Yafar* (Civil Application No. 107 Of 2020) UR thus:-

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this Court takes into account in deciding whether to grant an extension of time are: first the length of the delay, secondly, the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted.” (Emphasis mine)

12. An Applicant seeking the Court’s discretion to extend time must give sufficient reason for the delay. In the case of *Susan Ogutu Oloo & 2 Others v. Doris Odindo Omolo* (2019) eKLR the Court of Appeal held that:-

“In an application for extension of time, the single Judge has discretion. I am aware that the discretion I have is to be exercised judiciously and not whimsically or capriciously. The guiding principles on the issue of extension of time was laid out by the Supreme Court in *Nicholas Kiptoo Arap Korir Salat v. IEBC* (2014) eKLR Sup. Ct. Application No. 16 of 2014.

The Supreme Court aptly stated extension of time is not a right of a party; a party who seeks extension of time has the burden of laying a basis to the satisfaction of the Court. Of paramount importance, the reason for delay must be explained to the satisfaction of the Court. Further, the application for extension must be brought without undue delay and it must be demonstrated if the respondent will not suffer prejudice if extension is granted”.

13. The Applicant stated that the reason he could not file his Appeal on time was that the typing of the trial court proceedings took too long, a period of 54 days. He has stated that his advocate was in communication with the court registry on the typing of proceedings. He has attached correspondence to that effect. I am satisfied from my perusal of the annexed correspondences that the Applicant actively followed up on the proceedings and that the delay was on the part of the registry.

14. I however agree with the Respondents that the Applicant did not need the proceedings to file his Memorandum of Appeal within time. Indeed, I have seen that the Draft Memorandum of Appeal which the Applicant has annexed to the Application was dated 16th August 2024 and there was no apparent reason why he did not file then.

15. The Applicant has annexed a Certificate of Delay issued by the court administrator on 17th October, 2024. The Certificate confirms a delay of 54 days. The Court of Appeal in *Mistry Premji Ganji (Investments) Limited v Kenya National Highways Authority* [2019] eKLR held that:-

“..... A certificate of delay is usually issued in such cases, specifying the time taken for the proceedings to be typed, for purposes of exclusion of the same during computation”

16. Other than the observation that the Applicant may not have strictly needed the proceedings to draft the Memorandum of Appeal, the Certificate of Delay was prima facie evidence that the delay was not



caused by the Applicant, but by the court registry. I am therefore satisfied that the delay has been adequately explained.

17. On whether the delay was inordinate, I have noted that Judgment was delivered on 30th July 2024 and typed proceedings and certificate of delay were available from 9th October, 2024 and 18th October 2024 respectively. The present application for leave is dated 24th October, 2024 and was filed on 29th October, 2024. I find the delay not to be inordinate.
18. With respect to the probability of success in the appeal, Applicant has urged that he has an arguable appeal with high chances of success. The Respondent on the other hand has urged the position that the Applicant stood no chance as he was relying on issues which had been admitted in the trial court. In the absence of the trial record, this court would be reluctant to make an evaluation on whether or not the intended Appeal was likely to succeed. Suffice to state that the scales of justice would tilt more on allowing as opposed to curtailing the constitutional right to appeal. I have also taken note from the Respondent's submission, that this litigation has taken an unduly long period.
19. In the final analysis, and in the exercise of my discretion, I grant the Applicant leave to file his Appeal out of time on the following conditions:-
 - i. The Applicant shall file the Memorandum of Appeal to the Record of Appeal strictly within 14 days and 21 days respectively of this Ruling.
 - ii. The leave so granted shall terminate on the 22nd day from today.
 - iii. Though successful, the Applicant is denied costs of this Application for reason that the same would amount to punishing the Respondent for the omissions of the Applicant.

Orders accordingly.

RULING DELIVERED, DATED AND SIGNED AT CHUKA THIS 13TH DAY OF MARCH, 2023

R. LAGAT-KORIR

JUDGE

Ruling delivered in the absence of Mr. Kijaru for the Applicant, and in the presence of Mr. Muthomi for the Respondent and Muriuki (Court Assistant).

